

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES M. CLARK,

Defendant.

8:12CR342

MEMORANDUM AND ORDER

This matter is before the court on defendant's objections, [Filing No. 59](#), to the findings and recommendation of the magistrate judge, [Filing No. 58](#), regarding defendant's motion to dismiss, [Filing No. 40](#). The government charged defendant with embezzlement pursuant to [18 U.S.C. § 666](#). Defendant allegedly embezzled money from Westside High Community School District. Defendant contends that he is innocent, and he asserts that evidence that would prove his innocence has been destroyed. Pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\)](#), this court conducts a de novo review of the magistrate judge's findings to which the defendant objects. [*United States v. Lothridge*, 324 F.3d 599, 600-01 \(8th Cir. 2003\)](#). The court reviewed the entire record and concludes that the F&R of the magistrate judge should be reversed.

On October 30, 2013, the parties appeared for a hearing on defendant's motion to dismiss, Filing No. 52. Defendant produced eight witnesses to testify via subpoenas issued by Judge Gossett, and the government was prepared to call three or more witnesses. However, no one testified. Instead, the attorneys argued the case, and Judge Gossett determined that dismissal depended on the defendant showing that the actions of Westside in losing or destroying evidence was attributable to the government.

Judge Gossett did not hear any evidence, but instead he ordered the parties to submit additional briefing.

The parties submitted additional briefing. [Filing No. 54](#) and [Filing No. 57](#).

Thereafter, Judge Gossett ruled and denied the motion to dismiss and did not hold a hearing to permit the presentation of evidence. Findings, Recommendation & Order, [Filing No. 58](#).

The court agrees with the defendant that the magistrate judge erred in not holding an evidentiary hearing on the motion to dismiss and particularly for finding the defendant failed to present evidence. Defendant contends that the evidence will show that his rights have been materially affected and that the destruction of evidence is attributable to the government. Defendant is entitled to a hearing on this issue and to further develop his record.

THEREFORE, IT IS ORDERED:

1. Defendant's objections, [Filing No. 59](#), are granted.
2. The findings and recommendation of the magistrate judge, [Filing No. 58](#), are reversed.
3. This court will conduct an evidentiary hearing regarding defendant's motion to dismiss, [Filing No. 40](#), on **February 25 and 26, 2014, beginning at 9:00 a.m. each day**, Courtroom 3, Roman Hruska U.S. Courthouse, 111 So. 18th Plaza, Omaha, Nebraska.

Dated this 27th day of January, 2014.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge